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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

COLIN HEILBUT, Plaintiff and Appellant, v. EQUINOX HOLDINGS, INC., Defendant and Respondent.	A157441 (City & County of San Francisco Super. Ct. No. CGC-17-561863)

Plaintiff Colin Heilbut sued defendant Equinox Holdings, Inc. (Equinox), claiming he was sexually assaulted by an Equinox employee at an Equinox gym. The complaint asserted violations of the Unruh Civil Rights Act (Civ. Code, § 51; the Unruh Act)[1] and the Ralph Civil Rights Act (§ 51.7; the Ralph Act), sexual battery (§ 1708.5), negligent supervision and retention, negligent and intentional infliction of emotional distress, and assault and battery. The trial court sustained Equinox's demurrer to Heilbut's retaliation cause of action under the Ralph Act without leave to amend. The court later granted Equinox summary judgment on all the remaining causes of action. Heilbut challenges both rulings. We affirm.

[1] All statutory references are to the Civil Code unless otherwise indicated.

BACKGROUND

I. The Complaint

Heilbut's complaint against Equinox, asserted nine causes of action: (1) discrimination under the Unruh Act; (2) retaliation under the Unruh Act; (3) gender- and/or sex-motivation violence under the Ralph Act; (4) retaliation under the Ralph Act; (5) sexual battery (§ 1708.5); (6) negligent retention or supervision; (7) intentional infliction of emotional distress; (8) negligent infliction of emotional distress; and (9) assault and battery. Heilbut voluntarily dismissed the negligent and intentional infliction of emotional distress claims.

As alleged, Heilbut was a member of an Equinox gym in San Francisco. On August 1 and 3 of 2017, Heilbut attended group yoga classes taught by Equinox employee, Kevin Nguyen. According to Heilbut, during the group class on August 1, "Nguyen paid Mr. Heilbut a disproportionate amount of attention." "In one instance, Mr. Nguyen cupped Mr. Heilbut's genitals under the pretense of providing him assistance with a yoga pose." When that class was over, Nguyen stayed to give additional yoga instruction to several students, including Heilbut. When the other students left, Nguyen proceeded to give Heilbut " 'stretches,' " which "involved frequent and unnecessary physical contact with Mr. Nguyen for prolonged periods of time."

Heilbut attended Nguyen's class again on August 3, after which Heilbut and other students stayed to practice without Nguyen's assistance. When Heilbut began packing his belongings to leave, Nguyen offered to give Heilbut one-on-one stretching. Heilbut accepted. Heilbut alleged that during this private interaction, Nguyen, among other things, engaged in poses that "involved extensive and unnecessary body contact with Nguyen" and gave Heilbut an "unrequested, unconsented-to neck and shoulder massage."

Heilbut further alleged he noticed that Nguyen "had an erection" and "emitted a short, sensual moan, for no apparent reason."

On August 4, 2017, Heilbut reported to Equinox that he was sexually assaulted by Nguyen. That same day, Heilbut met with Equinox's employees to discuss the events of August 1 and 3. On August 7, Heilbut filed an incident report with the San Francisco Police Department (SFPD) about the alleged assault. On August 28, Heilbut received a phone call from Equinox and was told that Equinox had completed its investigation and decided to revoke Heilbut's membership.

Heilbut alleged that Equinox retaliated against him for reporting the sexual assaults by terminating his membership. Heilbut also alleged that Equinox is vicariously liable for Nguyen's conduct because the assault was reasonably foreseeable to Equinox and ratified by Equinox when it revoked Heilbut's membership in order to retaliate against him. Heilbut claimed he suffered substantial emotional distress and anxiety as a result of the assault, and sought punitive damages.

II. Demurrer

Equinox demurred to Heilbut's causes of action for retaliation under the Unruh Act and Ralph Act because, as a matter of law, neither statute covers retaliatory discrimination. The trial court overruled the demurrer to the Unruh Act cause of action, but sustained the demurrer to the Ralph Act cause of action without leave to amend.

III. The Motion for Summary Judgment

Equinox moved for summary judgment or, alternatively, for summary adjudication on the remaining causes of action. Equinox argued Heilbut could not establish that respondeat superior or ratification supported holding Equinox vicariously liable for Nguyen's conduct. Therefore, summary

judgment was warranted on Heilbut's causes of action for discrimination under the Unruh Act, gender- and/or sex-motivated violence under the Ralph Act, sexual battery, and assault and battery. Equinox specifically asserted it did not ratify Nguyen's conduct because it "fully investigated Heilbut's claims" and terminated Nguyen's employment days after Heilbut made his complaint. It supported the assertions with declarations and deposition testimony from its employees regarding its internal investigation of Heilbut's report, as well as the testimony of the SFPD's investigating officer.[2]

Equinox also argued that the Unruh Act does not support a cause of action for retaliation, and even if it did, there was no evidence of retaliation. Equinox argued for summary judgment on Heilbut's negligent retention and supervision claim because it was undisputed that Nguyen had no history of sexual assault that would put Equinox on notice of his propensities.

Heilbut argued there was a triable issue of ratification based on evidence that Equinox "retaliate[ed] against [Heilbut] for reasonably complaining of Mr. Nguyen's conduct."[3] Heilbut also attempted to raise an

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[2] Equinox filed a motion seeking an order allowing it to file under seal certain confidential documents which were the subject of a stipulated protective order approved by the trial court. These documents included plaintiff's deposition transcript, the SFPD's police file produced in discovery, and the deposition transcript of Sergeant Sonny Sarkissian, the assigned detective to Heilbut's case. The documents Equinox lodged under seal in the trial court were filed under seal in this Court. We have reviewed the publicly filed redacted versions of these documents and have concluded that we do not need to use or rely upon the unredacted version of any of the documents filed under seal.

[3] Heilbut also filed a motion to file under seal certain confidential documents which were the subject of the stipulated protective order. He lodged under seal those same documents in this Court. As with Equinox's unredacted documents, we do not need to use or rely upon the unredacted version of any of the documents filed by Heilbut.

inference of retaliation in several different ways. He argued that Equinox "acted unreasonably in its investigation." He disputed Equinox's claim that he was " 'untruthful' " in his allegations, and asserted that Equinox provided "shifting and inconsistent" justifications for canceling Heilbut's membership. He also claimed that the decision to cancel his membership was made before the SFPD concluded its own investigation to counter Equinox's claim that it relied on the SFPD's results before making its decision. Analogizing to retaliation claims in the employment context, Heilbut argued that Equinox's stated reasons for terminating Nguyen's employment were "pretextual."

Heilbut maintained that the Unruh Act provides a distinct cause of action for retaliation. Based on the same arguments he raised to show ratification, Heilbut asserted that Equinox violated the Unruh Act when it terminated his membership to retaliate for his reporting the sexual assault. Heilbut did not address Equinox's arguments concerning his claim for negligent retention and supervision.

Equinox and Heilbut each objected to the other's proffered evidence.[4]

The trial court granted summary judgment. The court found no basis for vicarious liability on Heilbut's causes of action for discrimination under the Unruh Act, violence under the Ralph Act, sexual battery, and assault and battery (the first, third, fifth, and ninth causes of action) because he failed to raise a triable issue that either the assault was reasonably foreseeable or ratified by Equinox. In the court's view, Equinox's termination of Nguyen six days after receiving Heilbut's complaints "undermines Plaintiff's ratification

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[4] Equinox renews several evidentiary objections that the trial court did not rule on. Heilbut argues we should overrule the objections. We need not resolve these evidentiary issues because we need not consider the contested evidence.

theory." Heilbut's second cause of action for retaliation failed "because under the weight of recent authority, the Unruh Civil Rights Act 'does not encompass discrimination based on retaliation.' [Citation.]" Summary judgment on the negligent supervision and retention claim was based on Nguyen's lack of history of sexual assault. The trial court entered judgment in favor of Equinox.[5]

DISCUSSION

I. Summary Judgment

A. Standard of Review

Summary judgment is proper when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "A moving defendant has met its burden of showing that a cause of action has no merit by establishing that one or more elements of a cause of action cannot be established or that there is a complete defense. [Citations.] We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party." (*Gundogdu v. King Mai, Inc.* (2009) 171 Cal.App.4th 310, 313.)

B. Causes of Action Based on Vicarious Liability

Heilbut argues the trial court erred in granting summary judgment as to his causes of action for discrimination under the Unruh Act, gender- and/or sex-motivated violence under the Ralph Act, sexual assault, and assault and battery. He contends the court incorrectly found no basis for vicarious

[5] Heilbut did not attach the March 27, 2019 judgment in the appellant's appendix. He did, however, attach a copy of the judgment to the Civil Case Information Sheet, filed in the instant appeal on June 17, 2019, pursuant to rule 8.100(g) of the California Rules of Court.

liability because there was a triable issue over whether Equinox ratified Nguyen's misconduct. We disagree.

Heilbut does not address the trial court's finding that there was no vicarious liability under the theory of respondeat superior; so he forfeits that issue on appeal. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177.) We thus address only Equinox's possible liability based upon ratification.

1. Legal Principles of Ratification

"Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 (*Rakestraw*); *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1490–1491 (*Fretland*)). "An employer may be liable for an employee's willful and malicious actions under principles of ratification. (Civ. Code, § 2339; Rest.2d, Agency § 218.)" (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 810 (*Delfino*).) "A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.' " (*Rakestraw*, *supra*, 8 Cal.3d at p. 73.)

" '[R]atification may be proved by circumstantial as well as direct evidence.' " (*StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 242 (*StreetScenes*).) " 'The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery.' " (*C.R. v.*

Tenet Healthcare Corp. (2009) 169 Cal.App.4th 1094, 1110 (*C.R.*).) In addition, "[t]he failure to discharge an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. [Citation.]" (*Delfino*, *supra*, 145 Cal.App.4th at p. 810.) Although ratification is generally a question of fact (*StreetScenes*, *supra,* 103 Cal.App.4th at p. 242), it is one of law "if the facts are undisputed and no conflicting inferences are possible." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 162.)

2. There Is No Triable Issue on Whether Equinox Ratified Nguyen's Misconduct

Equinox argued there was no ratification of Nguyen's conduct because it "fully investigated [Heilbut's] claims, complied with all requests from the SFPD when it investigated his claims, and terminated Nguyen a mere six days after [Heilbut] complained for reasons unrelated to [Heilbut's] allegations." In support, Equinox submitted undisputed evidence showing that approximately 30 minutes after learning of Heilbut's allegations over the phone on August 4, 2017, Jamie Phipps, Equinox's assistant general manager, and Zelda Curry, the operations manager, met with Heilbut in the general manager's office. Phipps took notes of the interview. At the end of the interview, Heilbut and Phipps agreed Heilbut should formalize his complaint in writing. On August 7, Heilbut provided a written sexual assault complaint.

A team of Equinox human resources and operations managers investigated Heilbut's complaint. At the direction of Ashley Lautman, the Northern California Human Resources Manager for Equinox, its risk manager obtained and viewed all the security camera footage from the Equinox facility. He provided Lautman with footage of Heilbut's interactions with Nguyen during and after the group yoga classes on August 1 and 3. She

reviewed the video several times. Then, Lautman and Colleen Harnett, general manager for Equinox, personally interviewed Nguyen. During Nguyen's interview, the managers showed Nguyen portions of the security camera footage of the incident. He admitted he may have accidentally touched Heilbut but denied any sexual assault.

Based on the interviews with Heilbut and Nguyen and its review of the security camera footage, Equinox determined that Heilbut's allegations were unsubstantiated and that Heilbut had not been truthful.

On August 10, 2017, Equinox terminated Nguyen's employment because he committed "gross misconduct" when he worked off the clock with Heilbut and was dishonest during Equinox's investigation about the length of time he spent with him after class and off the clock.

This evidence shows that Equinox conducted a prompt and adequate investigation into Heilbut's allegations, found those allegations were unsubstantiated, but nevertheless terminated Nguyen's employment. This evidence was sufficient to satisfy Equinox's initial burden to show that Heilbut could not establish it ratified Nguyen's conduct. (See *Fretland*, *supra*, 69 Cal.App.4th at pp. 1490-1491 [summary judgment proper where evidence showed company investigated harassment allegations and issued "letter of warning" to alleged harasser]; see also *Delfino*, *supra*, 145 Cal.App.4th at p. 810 [summary judgment proper where it was undisputed employer was unaware of employee's transmission of threatening emails, suspended employee immediately after discovering them, and terminated him 8 days later].) The burden shifted to Heilbut to show a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

In attempting to do so, Heilbut first argues that summary judgment on ratification was improper because "whether [Heilbut's] complaint was made

on a good-faith, reasonable basis is not a determination appropriate for summary judgment." This contention misses the point. "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." (*Rakestraw*, *supra*, 8 Cal.3d at p. 73.) For purposes of ratification, the relevant focus is on the employer's response, or lack thereof, to an employee's conduct, not the victim's subjective belief that an assault occurred. Even if we assume that Heilbut's allegations were true, a finding of ratification would require evidence that Equinox voluntarily elected to adopt the assault as its own conduct. (See *Rakestraw*, at p. 73.) Heilbut's subjective "good-faith" belief that he was assaulted is not relevant to that inquiry.

Heilbut next argues that Equinox cancelled his membership in retaliation for his report of the assault. He says this act of retaliation shows Equinox's ratification of Nguyen's conduct. In an attempt to establish retaliation, Heilbut argues that "the factual accuracy of [Equinox's] justification is questionable and called into doubt by its shifting justifications [for canceling Heilbut's membership]." However, Heilbut makes no effort to cogently analyze this argument in his opening brief. He merely incorporates by reference arguments raised before the superior court. Therefore, we may treat this issue as forfeited. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007; see *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334 (*Garrick*) [appellant may not simply incorporate by reference arguments made before the trial court rather than brief the arguments on appeal].) Heilbut "attempt[s], in [his] reply brief, to develop the argument, but it is too late. We disregard issues not

properly addressed in the appellant's opening brief. [Citation.]" (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 821.)

But even if we were to consider the cancelation of his membership, Heilbut fails to raise a triable issue that Equinox retaliated against him or ratified Nguyen's conduct. In his reply brief, Heilbut asserts that an Equinox employee testified Equinox canceled his membership because Heilbut's " 'claims were unsubstantiated' " then "change[d] his testimony to say that he believed the allegations to be " 'not truthful.' " Heilbut also points out that an Equinox employee testified that if Heilbut " 'wasn't happy' " then " 'it was probably in the best interest of us to part ways.' " But these statements are not fundamentally in conflict. They do not establish that Equinox offered "shifting justifications" or retaliated against Heilbut in cancelling his membership.

As another example of Equinox's "shifting justifications," Heilbut says that, while Equinox claimed it relied on the results of the SFPD investigation in deciding whether to cancel his membership, it "had already decided to terminate [Heilbut's] membership before either it or the police department had conducted a full investigation." But the undisputed facts show that, even though Equinox decided to cancel Heilbut's membership before it received the results of the SFPD investigation, it waited for the results before going through with the cancelation. Once the SFPD advised Equinox of its determination, Equinox then "felt more comfortable proceeding." The evidence does not support Heilbut's contention that Equinox gave conflicting explanations for its decision to cancel his membership.

Heilbut says another instance of Equinox's shifting justifications occurred when "[Equinox] credited [Heilbut's] allegations," particularly when its employees described Nguyen's conduct as inappropriate, unprofessional,

or suspicious. But these observations, too, are not irreconcilable with Equinox's determination that the assault was unsubstantiated. Equinox could find Nguyen's conduct was inappropriate, unprofessional, or suspicious, yet still conclude there was no sexual assault. The evidence does not support Heilbut's assertion that reasonable inferences of retaliatory motive and ratification may be drawn from Equinox's justifications for its decision to cancel his membership.

Heilbut's reliance on *Gurrola v. Jervis* (C.D.Cal. Apr. 2, 2009, No. CV 08-8029-GW JTLX) 2009 WL 9548218 (*Gurrola*) and *Lytle v. Carl* (9th Cir. 2004) 382 F.3d 978 (*Lytle*), is misplaced. In *Gurolla*, the district court found the plaintiffs adequately alleged sexual harassment under the Fair Housing Act. (*Gurolla*, *supra*, at pp. *5-6.) The plaintiff tenants complained to the owners of their apartment building that its property manager committed lewd acts in front of them. (*Id.* at p. *1.) In response to the complaints, the owners served the plaintiffs with individual notices to vacate, ceased performing maintenance and repairs in their apartment units, informed some of the plaintiffs they would no longer be able to maintain their companion/service dog, charged other plaintiffs with excessive pet deposits, and threatened to circulate letters to other landlords so they could not find other housing. (*Ibid.*) The district court found retaliation and concluded that "[s]uch retaliation can be viewed as ratification." (*Id.* at p. *5.)

Gurolla involved numerous retaliatory acts that bear no similarity to the evidence in this case. In *Gurolla* the owners' responses to the tenants' complaints, were " 'inconsistent with any reasonable intention on [the owners'] part, other than that they intended approving and adopting [the conduct of the property manager].' " (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.) The same cannot be said here. The evidence establishes that

Equinox decided to cancel Heilbut's membership after conducting a good faith investigation into his allegations and concluding they were unsubstantiated.

Equally unpersuasive is Heilbut's reliance on *Lytle v. Carl*, *supra*, 382 F.3d 978. In *Lytle*, a teacher brought an action under 42 U.S.C. section 1983 against the superintendent of her employing school district. (*Id.* at p. 981.) The Ninth Circuit found sufficient evidence that the superintendent fired the teacher in retaliation for an earlier section 1983 action that the teacher successfully brought against the district. (*Ibid.*) The teacher presented evidence that administrators investigated and denied her request for two days of sick leave, instigated unwarranted discipline, such as reprimanding her in front of her class and keeping a log of her daily activities, and failed to adequately investigate her complaints of harassment. (See *id.* at pp. 987-988.) There is no evidence here that Equinox ignored Heilbut's complaints or that its decision to cancel Heilbut's membership was arbitrary and without justification.

Heilbut takes issue with the significance of Equinox's decision to terminate Nguyen. He says, "[t]he trial court further erred because its reasoning presumed that [Equinox's] ratification of its employee's acts was cured by its subsequent termination of that employee—regardless of the reasons for that termination." He maintains that, because Equinox terminated Nguyen for reasons unrelated to Heilbut's allegations, it did not repudiate Nguyen's misconduct. According to Heilbut, Nguyen's termination "could only be relevant to ratification if [Equinox] had in fact terminated him for the wrongful conduct, which it claimed it had not." Heilbut's position is untenable.

The undisputed evidence shows that Equinox did indeed terminate Nguyen because of his interactions with Heilbut. Although it was not for a

sexual assault, Equinox acknowledged that Nguyen committed "gross misconduct." As the trial court explained, "[Equinox] never said, I don't think, what [Nguyen] did was perfectly appropriate; what they said is, we don't know what he did exactly, but this is serious enough, and his admissions in the course of the investigation to, for example, working off the clock and so on, are sufficient to warrant his termination." It further noted that if Equinox had said, "what he did was perfectly fine," "I would have no hesitation in saying that's pretty good evidence of ratification. But that's not what happened here." We agree with the trial court's reasoning and conclude that Nguyen's termination was evidence negating ratification. (See *Delfino*, *supra*, 145 Cal.App.4th at p. 810.)

Finally, Heilbut contends Equinox's "perfunctory investigation constitutes yet another way in which it ratified its employee's conduct." Heilbut picks at Equinox's efforts by saying that Equinox "offered shifting justification for its termination of [Heilbut's] membership," "never interviewed [Heilbut] after his initial complaint," "identified but never contacted any witnesses," "failed to investigate statements by its employee that its own investigator found suspicious and odd[,]" and "deci[ded] to terminate [Heilbut's] membership within days of [Heilbut's] complaint and prior to the completion of any investigation."[6] According to Heilbut, these facts taken together establish Equinox's "investigation fell far short of 'full' at

[6] In oral argument, Helbut's counsel faulted Harnett, the Equinox general manager, for not viewing all of the security footage from Nguyen's classes. But Heilbut did not dispute Equinox's review of the video or raise any such claim of partial or incomplete review in opposition to the motion for summary judgment. Heilbut's failure to specify this purported fact within his opposing papers waives the issue on appeal. (See *North Coast Business Park v. Nielson Construction Co.* (1993) 17 Cal.App.4th 22, 30–32.) Moreover, the video was also reviewed by others, notably Equinox's risk manager and Ashley Lautman.

best, and at worst was simply a *post hoc* justification for its retaliation against [Heilbut.]" Because Heilbut supports this argument by reference to arguments he made in the trial court rather than discussing the issues anew, he has forfeited it on appeal. (See *Garrick*, *supra*, 3 Cal.App.4th at p. 334.) In any event, we reject these arguments for the same reasons we reject Heilbut's claims concerning Equinox's "shifting justifications," discussed above.

In sum, there is no triable issue as to whether Equinox ratified Nguyen's misconduct. The trial court properly granted summary judgment in favor of Equinox on Heilbut's causes of action for discrimination under the Unruh Act, gender- and/or sex-motivated violence under the Ralph Act, sexual assault, and assault and battery.

C. Retaliation Cause of Action under the Unruh Act

Heilbut also argues the trial court should not have granted summary judgment on his Unruh Act cause of action for retaliation. Again, we disagree.

1. Legal Framework

The Unruh Act provides that all persons in California "are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (§ 51, subd. (b).) Anyone who "denies, aids or incites a denial, or makes any discrimination or distinction contrary to [the Unruh Act]" is liable for damages and penalties. (§ 52, subd. (a).)

Prior to 1991, the California Supreme Court issued a series of opinions concluding that the Unruh Act's "protections were not confined to the enumerated categories in the statute but that these categories were 'illustrative rather than restrictive.' [Citation.]" (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 839 (*Koebke*).) Because the Court considered the Act "to ban *all* forms of arbitrary discrimination in public accommodations," (*Id.* at p. 840.) the Court established various "judicially recognized classifications[,] includ[ing] unconventional dress or physical appearance [citation], families with children [citation], homosexuality [citation], and persons under age 18 [citation]." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 (*Hessians*); see *Vaughn v. Hugo Neu Proler International* (1990) 223 Cal.App.3d 1612, 1617, 1619-1620 (*Vaughn*) [retaliatory action for pursuing Unruh Act claim is itself arbitrary discrimination in violation of the Unruh Act].)

However, in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 (*Harris*), the Supreme Court reexamined the cases that treated the Act's classifications as " 'illustrative rather than restrictive' " (*id.* at p. 1152) and cautioned against further extending the Unruh Act's scope. In *Harris*, the plaintiffs claimed Unruh Act discrimination based on a landlord's policy to require that tenants have a certain minimum income. (*Id.* at p. 1148.) The high court rejected the claim after reexamining whether the Unruh Act prohibited all arbitrary discrimination by a business enterprise. (*Id.* at p. 1154.) "[W]ere we writing on a clean slate, the repeated emphasis in the language of sections 51 and 52 on the specific classifications of race, sex, religion, etc., would represent a highly persuasive, if not dispositive, factor in our construction of the Act. [Citation.]" (*Id.* at p. 1159.) The Court concluded "the Legislature intended to confine the scope of the Act to the . . .

types of discrimination" specifically enumerated in the statute. (*Id.* at p. 1155.)

Despite this conclusion, *Harris* did not overrule prior cases which extended the Act to certain nonenumerated classifications. (See *Harris*, *supra*, 52 Cal.3d at p. 1155; *Hessians*, *supra*, 86 Cal.App.4th at p. 836.) "The [C]ourt did, however, adopt a new, narrower construction of the Act and 'made it clear *future expansion* of prohibited categories should be carefully weighed to ensure a result consistent with legislative intent. [Citations.]' [Citation.]" (*Hessians*, at p. 836.) The Court devised a three-step inquiry for considering application of the Unruh Act to claims of economic status discrimination "in light of both the language and history of the Act and the probable impact on its enforcement of the competing interpretations urged on us by the parties" (*Harris*, at p. 1159): (1) the language of the statute, (2) the legitimate business interests of the defendants, and (3) the consequences of allowing the new discrimination claim. (*Id.* at pp. 1159-1169.)

In applying these factors, first, the *Harris* court "discerned an essential difference between economic status and both the [Unruh] Act's enumerate categories and those added by judicial construction." (*Koebke*, *supra*, 36 Cal.4th at p. 841.) Second, the Court found the defendants "ha[d] a legitimate and direct economic interest in the income level of prospective tenants, as opposed to their sex, race, religion, or other personal beliefs or characteristics." (*Harris, supra*, 52 Cal.3d at p. 1163.) Third, it found "two significant adverse consequences" that would flow from the plaintiffs' proposed construction of the Act, particularly the "multitude of microeconomic decisions [courts] are ill equipped to make" and the risk that landlords might be induced to abandon neutral criteria such as income and instead use subjective criteria that might "disguise and thereby promote the

very kinds of invidious discrimination based on race, sex and other personal traits that the Unruh Act prohibits." (*Id.* at p. 1169.)

"In the wake of *Harris*, courts have consistently followed this three-part analysis when determining whether a 'new' classification is a form of discrimination prohibited by the Act." (*Hessians*, *supra*, 86 Cal.App.4th at p. 836.) In particular, cases have applied the *Harris* approach to hold that the Unruh Act does not cover business retaliation against patrons who have previously brought actions against the business. (See, e.g., *Gayer v. Polk Gulch, Inc.* (1991) 231 Cal.App.3d 515, 522-525 (*Gayer*) [no violation for bar to deny services to patron who previously sued the bar under Unruh Act]; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 934 (*Scripps*) [no violation for medical group to deny care for any patient who previously sued the group for medical malpractice].)

Gayer, *supra*, 231 Cal.App.3d 515, is instructive. In *Gayer*, the plaintiff attempted to enter the defendant's bar and was told he was free to enter the bar but would not be served. (*Id.* at pp. 518-519.) The doorman told the plaintiff that he was being denied service because he had a pending small claims action against the bar under the Unruh Act. (*Id.* at p. 518.) As a result of this interaction, the plaintiff brought another suit and claimed that "as a member of a class of civil rights litigants" he was protected from retaliation under the Unruh Act. (*Id.* at p. 519.)

Our colleagues in Division Four disagreed, "conclud[ing] that the Act does not encompass discrimination based on retaliation." (*Gayer*, *supra*, 231 Cal.App.3d at p. 519.) The court held that recognizing such a claim for retaliation would "cover discrimination which is neither based on status as a member of a class nor on personal characteristics but is, instead, based on the conduct of an individual." (*Id.* at p. 525.) The court rejected the retaliation

claim observing,"[w]ere we to hold that the conduct involved here gave rise to a protected class under the [Unruh] Act, we would open the door for a seemingly endless stream of new cases never contemplated by the Legislature." (*Id.* at p. 525.) Thus, the plaintiff failed to state a cause of action under the Unruh Act. (*Ibid.*)

2. Analysis

In order to determine whether Equinox's cancelation of Heilbut's membership violates the Unruh Act, we apply the *Harris* three-part test, and look to "(1) the language of the statute, (2) the legitimate business interests of the defendants, and (3) the consequences of allowing the new discrimination claim[.]" (*Hessians*, *supra*, 86 Cal.App.4th at p. 836.) Because Equinox's cancelation of Heilbut's membership is closely analogous to Gayer's exclusion from the bar, we are guided by that decision.

We first consider the language of the statute. (*Harris*, *supra*, 52 Cal.3d at p. 1159.) Gayer claimed retaliation for his pending lawsuit against the defendant. Heilbut claims retaliation because he reported a sexual assault to Equinox. Making a complaint, like filing a lawsuit, is not "based on status as a member of a class nor on personal characteristics but is, instead, based on the conduct of an individual." (*Gayer*, *supra*, 231 Cal.App.3d at p. 525.) Heilbut does not fall within one of the enumerated classes provided statutory protection in the Unruh Act.

We next consider whether Equinox has a legitimate business interest in excluding members who bring unsubstantiated complaints against its staff. (*Harris*, *supra*, 52 Cal.3d at p. 1162.) It is well established that a business "may . . . promulgate reasonable deportment regulations" (*In re Cox* (1970) 3 Cal.3d 205, 217 (*Cox*)) and that "legitimate business interests may justify limitations on consumer access to public accommodations." (*Harris*, at

p. 1162.) As a general rule, a business may refuse to serve a patron based on the patron's conduct. Here, Equinox canceled Heilbut's membership "to protect [Equinox's] employees, patrons and businesses from another unsubstantiated and untruthful allegation of sexual assault by [Heilbut]." It is not unreasonable for a business to take action to prevent the proliferation of false allegations against it or its employees, especially when those allegations are based on a claim of sexual assault. Thus, we cannot conclude the cancelation of Heilbut's membership was not "rationally related to the services performed and the facilities provided." (*Harris*, *supra*, 52 Cal.3d at p. 1162, quoting *Cox, supra*, 3 Cal.3d at p. 217.)

Heilbut seeks to limit the business interests recognized in the cases. He asserts that "recognition of 'legitimate business interest[s]' has been specifically related to the financial operation of the business in question, such as refusing to sell to a competitor or barring a patron who had previously written bad checks." According to him, Equinox's "claimed interest bears no resemblance to those business interests recognized thus far." We disagree. Allegations of sexual assault by a business's employees may be just as damaging to a business's success as a bad check, unpaid bill or physical disruption of the premises.

Heilbut further argues that "retaliation against a patron for making a good-faith, reasonable complaint of discrimination contravenes the state's public policy in reducing discrimination based on gender" and "cannot be a 'legitimate business interest.' " Again, his concept of retaliation is misplaced. Heilbut failed to raise a triable issue that Equinox discriminated against him in the first instance. We have no difficulty concluding that the cancelation of Heilbut's membership serves a legitimate business interest.

Finally, we consider the consequences of allowing the discrimination claim asserted by Heilbut to proceed. (*Harris*, *supra*, 52 Cal.3d at p. 1165.) Like the "new" class of "civil rights litigants" in *Gayer*, "to hold that the conduct involved here gave rise to a protected class under the Act, we would open the door for a seemingly endless stream of new cases never contemplated by the Legislature." (*Id.* at p. 525.)

We agree with the trial court. The Unruh Act does not provide a basis for Heilbut's retaliation cause of action. Heilbut's reliance on *Vaughn*, *supra*, 223 Cal.App.3d 1612, does not alter our decision. "*Vaughn* was decided before *Harris* and relied upon earlier California Supreme Court cases that applied the more expansive application of the Unruh Civil Rights Act the California Supreme Court explicitly rejected in *Harris*." (*Scripps*, *supra*, 108 Cal.App.4th at p. 935.)[7] Although *Vaughn* was not overruled, we are nonetheless bound by *Harris* and must apply its three-step test.

Moreover, the majority in *Gayer* rejected *Vaughn's* reasoning and held that a plaintiff cannot state a claim for retaliatory discrimination under the Unruh Act. (*Gayer*, *supra*, 231 Cal.App.3d at p. 521.) Heilbut says "*Gayer*'s value here is in serious doubt in light of [The Civil Rights Act of 2005]." He is relying upon Assembly Bill No. 1400 (2005-2006 Sess.) (Stats. 2005, ch. 420, § 2(b)), which provides, "It is the intent of the Legislature that [the] enumerated bases [of discrimination in the Unruh Act] shall continue to be construed as illustrative rather than restrictive." But Heilbut does not explain how *Gayer* conflicts with this legislative directive, and we conclude it

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[7] Equinox requests that we take judicial notice of the Supreme Court's register of actions in *Harris*, Supreme Court Case No. S011367. We deny Equinox's request, as the document is irrelevant to our analysis. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1 [material to be judicially noticed must be relevant]; Evid. Code, §§ 459, 452, subds. (b), (c).)

does not. *Gayer* applied *Harris*, which did not abrogate the "illustrative rather than restrictive" principle (*Gayer*, at p. 520). Rather, *Harris* explained that the Unruh Act does not ban all arbitrary discrimination. (See *Harris*, *supra*, 52 Cal.3d at pp. 1159-1169.)

Finally, *Vaughn* is easily distinguished. Heilbut did not previously bring a lawsuit under the Unruh Act. As a result, the public interest recognized in *Vaughn* to protect a person who has exercised the statutory right to sue under the Unruh Act is not implicated here. Additionally, in *Vaughn*, "there were no facts before the court to establish that the defendants were discriminating against plaintiff for any reason other than the fact that she had previously filed a lawsuit against them for sex discrimination." (*Vaughn*, *supra*, 223 Cal.App.3d at p. 1619.) Here, the undisputed facts show that Equinox did not arbitrarily cancel Heilbut's membership.

For all of the above reasons, we conclude summary judgment was properly granted to Equinox.

II. Demurrer

Heilbut also challenges the ruling sustaining Equinox's demurrer on his retaliation cause of action under the Ralph Act. The ruling on the demurrer was correct.

A. Standard of Review

" 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d

311, 318.) We " 'determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense.' " (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1172-1173.)

B. Heilbut Failed to State a Claim for Violation of the Ralph Act

The Ralph Act provides that all persons in California "have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51 [the Unruh Act], or position in a labor dispute, or because another person perceives them to have one or more of those characteristics." (§ 51.7, subd. (b).) "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277.)

The complaint alleges no violence or intimidation that was committed or threatened by Equinox against Heilbut and thus no Ralph Act cause of action exists in his own right. In particular, Heilbut alleged that Equinox "retaliated against Mr. Heilbut for reporting his sexual assault by an Equinox . . . employee by terminating his membership." Even if Equinox's cancelation of Heilbut's membership was in retaliation for reporting sexual assault, Equinox did not commit or threaten violence.

We conclude that the trial court correctly sustained Equinox's demurrer as to Heilbut's fourth cause of action for retaliation under the Ralph Act.

DISPOSITION

The judgment is affirmed. Equinox shall recover its costs on appeal.

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Siggins, P.J.

WE CONCUR:

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Petrou, J.

_____
Jackson, J.

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